



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 15, 1998

Mr. Jason Marshall
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR98-3113

Dear Mr. Marshall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120038.

The City of Coppell (the "city") received requests for various police department internal investigation files. We understand you to indicate that the information you have submitted as responsive to the request consists of representative samples of the responsive information.¹ Except for two of the requested files, numbers 96-003 and 95-008, which you say are being released, you seek to withhold the requested information under sections 552.101, 552.103 and 552.108 of the Government Code.

Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political

¹In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You indicate that this office has already found four of the requested files -- numbers 97-046, 97-194, 98-013, and 98-014 -- to be related to anticipated litigation and thus protected by section 552.103(a). See Open Records Letter No. 98-1084 (1998). You say that you "are unaware of anything that has transpired that would effect [sic] this previous ruling" and urge that these documents continue to be protected under section 552.103(a). Based on your representations, we conclude that, barring any change in circumstances, you may continue to withhold file numbers 97-046, 97-194, 98-013, and 98-014 at this time under section 552.103(a).

You contend that two of the requested files, numbers 97-144 and 98-015, relate to pending litigation brought by one of the subjects of these investigations, Michael Scott, a former city police officer, for wrongful termination. You provide a petition from the litigation in question. Having examined the documents at issue, we conclude that you may withhold file numbers 97-144 and 98-015 under section 552.103(a) at this time.

You contend that another file, number 97-071, relates to litigation you anticipate will be brought by another former police officer, Lisa Andrus. You provide documentation indicating that Ms. Andrus has engaged an attorney, appealed her termination, and filed a "Petition to Perpetuate Testimony of Employees of the City of Coppell." We conclude that the city may reasonably anticipate litigation by Ms. Andrus. Having examined file number 97-071, we conclude that it relates to such anticipated litigation. Accordingly, you may withhold file number 97-071 under section 552.103(a).

Please note, however, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). Also, absent special circumstances, which you have not shown here, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing parties

have seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize the city to withhold materials which have already been made available to the public pursuant to a decision of this office or otherwise. Open Records Decision No. 436 (1986).

You contend that another file, number 96-053, also relates to anticipated litigation. You provide a demand letter from an attorney seeking damages from the city in connection with the incidents to which the internal affairs investigation documented in file number 96-053 pertains. The incidents in question occurred in the summer of 1996. The demand letter, dated May 27, 1997, threatens that if settlement is not made within thirty days, a lawsuit will be filed. Although you indicate that court action was taken by the complainant, apparently in 1996, to expunge portions of file number 96-053, you do not indicate that further steps toward litigation have been taken in this matter. Given the time frame, we do not believe you have sufficiently demonstrated the continuing likelihood of the litigation in question. Therefore, you may not withhold file number 96-053 under section 552.103(a).

You also contend, with respect to the section 552.103(a) exception, that "all" of the requested internal investigation files relate to the litigation filed by Mr. Scott or to the litigation the city anticipates that Ms. Andrus will bring. You say that "both instances of litigation arise from actions taken following an internal affairs investigation" and that "[t]hese cases will focus upon the City's internal affairs investigations, and that these investigations were improperly performed." You state that "the City anticipates that a majority, if not all, of the requested internal affairs investigation files will be relevant to the litigation in one or both of the aforementioned lawsuits."

We have examined the pleadings and other material you submitted evidencing the litigation and anticipated litigation in question. In our opinion, you do not demonstrate, nor is it apparent on the face of the submitted materials, how any particular file, of those which we have not already determined you may withhold under section 552.103(a), is related to the litigation under the theory you advance. Accordingly, you may not withhold any of these files under this theory pursuant to section 552.103(a). Therefore, the only files you may withhold under section 552.103(a) are numbers 97-046, 97-194, 98-013, 98-014, 97-144, 98-015, and 97-071.

You claim that four of the files – numbers 97-085, 95-002, 96-003 and 95-006 – may be withheld under section 552.108(a)(2). Section 552.108(a)(2) excepts from required public disclosure:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

You argue generally that the four files in question relate to investigations of whether the subject employees committed crimes. You have not, however, provided any information responsive to the request for file number 96-003. Also, you indicate earlier in your brief that file number 96-003 is being released. Accordingly, you may not withhold file number 96-003 under section 552.108.

We note that file number 97-085 was treated in a recent decision of this office, Open Records Letter OR98-2867 (1998). You must release this file to the requestor here in accordance with that decision.

In our opinion, the information you submit as responsive to the request for file numbers 95-002 and 95-006 does not show that, nor have you explained how, the investigations to which the information relates were criminal ones. You may not withhold these files under section 552.108.

You contend that file numbers 96-004 and 96-028 are excepted under the common-law privacy aspect of section 552.101. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

It appears that file number 96-004 was treated in a prior decision of this office, Open Records Letter No. 98-1645 (1998). You must release information from this file in accordance with that decision.

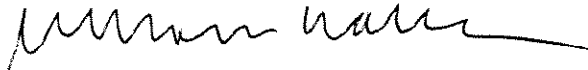
Having examined file number 96-028, we conclude that some of the information there is protected by common-law privacy. We have marked information which you must withhold under common-law privacy. We have also marked information in this file that appears to be subject to section 552.117(b), which requires withholding a peace officer's address, telephone number, social security number, and family information. Otherwise, file number 96-028 must be released.

In summary, you may withhold file numbers 97-046, 97-194, 98-013, 98-014, 97-144, 98-015, and 97-071 under section 552.103(a). You must release file numbers 97-085 and 96-004 in accordance the prior decisions of this office cited above. You must

also release file number 96-028 with the exception of information we have marked as protected by common-law privacy and section 552.117. Except as noted, the remaining information in the submitted files must be released. Also, the remaining requested files, which you have not submitted², must be released with the exception of information therein made confidential by law. *See e.g.* Gov't Code §§ 552.117, 552.130 (Texas driver's license and motor vehicle registration and title information confidential), 552.352 (criminal penalties for distribution of confidential information).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 120038

Enclosures: Submitted documents

cc: Mr. Richard Jackson
5115 McKinney Avenue, Suite D
Dallas, Texas 75205
(w/o enclosures)

²File numbers 95-001, 95-003, 95-004, 96-001, 96-002, 96-008, 96-009, 96-072, 97-029, 97-048, 97-083, 97-084, 97-151, 98-005, 98-007, 98-008.